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Taking forward multilateral nuclear disarmament negotiations

A treaty banning nuclear weapons

Submitted by Article 36 and the Women's International League for Peace and Freedom[2]

Executive summary

1. Against the background of the humanitarian discourse, it is important to examine the possible principles and elements for a treaty that could provide a framework for prohibiting and eliminating nuclear weapons.

(a) Banning nuclear weapons would likely entail the development of an international legal instrument prohibiting the use, development, production, stockpiling, transfer, acquisition, deployment, and financing of nuclear weapons, as well as prohibiting assistance with these acts.

(b) It could also recognize the responsibilities of States to ensure the rights of victims of nuclear weapon use or testing, require decontamination and remediation of affected areas, and provide for cooperation and assistance to meet these obligations.

(c) It could provide a framework for the elimination of nuclear weapons within agreed timeframes, for those States with nuclear weapons that join or that negotiate other agreements consistent with the treaty.

2. Such an instrument should also be considered in relation to other approaches under consideration.

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[2] This working paper was originally published by Article 36 and the Women's International League for Peace and Freedom in April 2014 as a report entitled: A treaty banning nuclear weapons: developing a legal framework for the prohibition and elimination of nuclear weapons. It is available at http://www.reachingcriticalwill.org/images/documents/ Publications/a-treaty-banning-nuclear-weapons.pdf.

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(a) A regulation of nuclear weapons based only on the prohibition of use could entrench the legitimacy of indefinite possession and further remove political pressure for disarmament; and would not bring international law on nuclear weapons into line with that on the other weapons of mass destruction in the same way that a comprehensive ban treaty would.

(b) A treaty banning nuclear weapons is not inconsistent with a nuclear weapons convention, which is seen as a treaty providing for the elimination of nuclear weapons. A ban treaty, in comprehensively prohibiting nuclear weapons, provides a framework for their total elimination. The key difference is that negotiation of the nuclear weapons convention as currently conceived places the onus on the nuclear-armed States to lead the process, in which they have indicated no interest.

(c) The step-by-step approach to nuclear disarmament has proven ineffective – many steps, first envisioned in the 1950s, are now superfluous, while others have been undermined by the actions of the nuclear-armed States. Continued insistence on this approach becomes problematic when it prevents progress, especially when lack of agreement on one obsolete step is used as pretext for no progress at all and when it serves to legitimize the continued possession of nuclear weapons in the meantime.

3. Beyond the basic principles for a treaty banning nuclear weapons, it is also useful to consider the process for making it happen.

(a) It is the responsibility of all States to make progress towards negotiations on nuclear disarmament.

(b) A treaty banning nuclear weapons could be developed and adopted even without the participation of the nuclear-armed States, despite the opposition of these States towards such an initiative. This requires a group of States to recognize the unacceptable consequences of nuclear weapons and begin negotiations to prohibit them, without being held back by States opposed to a ban.

(c) Such a treaty should not be seen as antagonistic towards nuclear-armed States. By contributing to international stigmatization and rejection of these weapons, it should be seen as supportive to all disarmament and arms control efforts.

(d) Banning nuclear weapons is a pragmatic way to confront the risk posed by nuclear weapons and is a logical evolution of nuclear disarmament discourse and process.

(e) There should be flexibility in consideration of the forum and process for negotiating such a treaty; the forum and process should be appropriate for the objective being pursued.

(f) The nuclear weapon free zone treaties, as regional prohibition agreements, point in the direction of a global treaty prohibiting nuclear weapons.

(g) An international process to develop a treaty banning nuclear weapons could transform civil society engagement in this area and provide unprecedented opportunities for political pressure.

4. A treaty banning nuclear weapons would have both normative and practical impacts on those States that stand inside and outside it.

(a) A ban treaty would offer States opposed to nuclear weapons an opportunity to formalise a categorical rejection of the use or possession of nuclear weapons by anyone under any circumstances.

(b) Establishing a clear rejection of nuclear weapons would enhance the stigma that already exists against these weapons. The process of banning nuclear weapons would

require governments to decide whether they want to continue to support nuclear weapons or reject them entirely.

(c) A ban treaty, negotiated and signed by a large number of the world's States, would have wide-ranging implications for nuclear weapons including: the prohibition of financial investment in nuclear weapons; pressures on military cooperation involving nuclear weapons; and the development of a stronger community of States and civil society working together towards elimination based on a clear legal prohibition of nuclear weapons.

5. A window of opportunity to ban nuclear weapons has opened. Signs of this include the unprecedented level of engagement of the Red Cross and Red Crescent Movement, a renewed enthusiasm within civil society evidenced by the International Campaign to Abolish Nuclear Weapons (ICAN), and an increasing willingness amongst non-nuclear-armed States to consider alternatives to the status quo of international discussions. This is coupled with growing recognition of the full range of catastrophic consequences that would result from any use of nuclear weapons, and of the spectrum of ways in which this could occur – whether intentionally or unintentionally. States, international organizations, and civil society should seize this historic moment and negotiate a comprehensive ban on nuclear weapons now.

Introduction

6. Since the atomic bombing of Hiroshima and Nagasaki, the prevailing diplomatic discourse on nuclear weapons has perpetuated an assertion that these weapons have utility as instruments of "strategic stability" – but only in the hands of a few select States. The legal framework intended to reduce the threat of nuclear war has always favoured certain States over others and thus has focused on preventing the proliferation of nuclear weapons.

7. This discourse has been sustained by concepts such as "nuclear deterrence", which asserts that nuclear weapons can be retained indefinitely for the primary purpose of preventing their use. Acceptance of these concepts worked to disguise the fact that nuclear weapons "have only one certain role: killing people en masse".[3]

8. This ideology emerged at the same time that the nuclear Non-Proliferation Treaty (NPT) was negotiated (1965–1968), primarily between the Soviet Union and the United States. They co-chaired the Eighteen-Nation Disarmament Committee and tabled the identical texts that formed the basis for its work.[4] Initially conceived of by Ireland as an urgent "stop-gap" needed while the two major military powers continued their negotiations on general and complete disarmament, the NPT is credited with preventing the proliferation of nuclear weapons beyond a handful of States. It offered the promise of disarmament and of guaranteed access to nuclear technology for "peaceful purposes". The Treaty eventually grew to near-universal membership through tumultuous times, including the end of the Cold War and has persisted so far through the crises of the twenty-first century. Yet, due principally to its provenance as a temporary and partial measure towards permanent disarmament, the Treaty has some inherent short- comings and faces further significant challenges stemming from the imbalanced and inconsistent way in which it has been implemented.

[3] Patricia Lewis, "The Inhumane Nature of Nuclear Arms; Efforts Toward Their Delegitimization," International Symposium for Peace: The Road to Nuclear Weapons Abolition, Hiroshima, Japan, 27 July 2013.

[4] See Alva Myrdal, The Game of Disarmament: How the United States and Russia Run the Arms Race, New York: Pantheon Books, 1976; and George Bunn and John B. Rhinelander, "LOOKING BACK: The Nuclear Non-Proliferation Treaty Then and Now," Arms Control Today, July/August 2008.

9. The NPT began as a temporary accommodation to the bi-polar world order. Members of the respective blocs accepted certain limitations on their independent possession of nuclear weapons while much of the non-aligned world sought to make their territories entirely free of nuclear weapons, pending their total elimination globally. Several key aspects of the Treaty have thus contributed to the initial development of a global norm against the acquisition and possession of nuclear weapons.

10. It guarantees the non-interference with the establishment of nuclear-weapon-free zones, which now cover 115 countries. The treaties establishing these zones share a common rejection of nuclear weapons and have helped generate national and regional identities focused on a commitment to prohibit and eliminate these weapons.

11. However, the NPT regime is increasingly out of touch with the post-cold war world. It discriminates between those who possess and those who do not possess nuclear weapons. This makes it vulnerable to accusations that it maintains a double standard while also enshrining disincentives for the nuclear-armed States to seriously undertake effective actions for nuclear disarmament.

12. The NPT does contain what is currently the only binding commitment to nuclear disarmament in a multilateral treaty. The provision in article VI that all States parties must pursue negotiations in good faith on effective measures relating to ending the arms race and achieving nuclear disarmament means that States not only have to engage in but also conclude these negotiations.[5] However, article VI does not establish a timeline or an accountability or verification mechanism for nuclear disarmament. Nuclear-armed States are not required to have a safeguards agreement with the International Atomic Energy Agency (IAEA). There is no established disarmament agency to oversee or promote nuclear disarmament activities.

13. The disarmament obligation contained within article VI originated at a time when the Soviet Union and United States were conducting formal negotiations on disarmament. But these negotiations never resumed after the NPT was concluded, despite those two States immediately rearming their intention to do so. They did embark on a programme of arms control, which continues to this day. However, that programme has a different objective: ensuring the sustainability and predictability of their nuclear weapon enterprises, not preparing them for inevitable disarmament.[6] Indeed, none of the nuclear-armed States have fulfilled the commitments made in exchange for the indefinite extension of the Treaty in 1995. They have also failed to abide by the unequivocal undertaking to accomplish the elimination of their nuclear arsenals. They upgrade and maintain their arsenals in contradiction to the aspirations of the Treaty.[7] In 2014 the Republic of the Marshall Islands led law suits in United States Federal Court and at the International Court of Justice in The Hague arguing that the failure of nuclear armed States to live up to their disarmament obligations constitutes a denial of human justice.

14. The NPT's non-proliferation objectives are situated within the context of its overarching goals, which include preventing nuclear war, stopping the nuclear arms race,

[5] All justices involved the International Court of Justice (ICJ) opinion in 1996 concurred that article VI and other international law requires that states "pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and e ective international control." See *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 2006, I.C.J. Reports 1996, p. 226, at ¶ 105(2)F.

[6] See Michael Spies, "The Emergence of Partial Nuclear Disarmament and the Step-by-Step Approach," ACUNS/ASIL Summer Workshop on International Organization Studies, Vienna, 20–26 July 2013.

[7] John Burroughs, "International law," Assuring destruction forever: nuclear weapon modernization around the world, New York: Reaching Critical Will of the Women's International League for Peace and Freedom, 2012.

ceasing the manufacture of nuclear weapons, eliminating existing arsenals, and easing international tensions and strengthening trust between States. However, to accomplish its objectives the Treaty establishes a quid-pro-quo relation- ship amongst its two classes of parties. While this does not affect the binding nature of the Treaty's provisions, the failure of one side to live up to its part of the bargain affects the perceptions and behaviour of the other side.[8] Furthermore, the retention of nuclear weapons by some States undermines the Treaty's non-proliferation goals. As long as nuclear weapons continue to exist – and to be revered by some as tools of national security – proliferation risks will remain.

15. At the 2015 NPT Review Conference, the Treaty's five nuclear-armed States parties were mandated to report on their progress in implementing action 5 of the 2010 NPT Action Plan. While they met with each other on a number of occasions after the 2010 conference, their collective efforts were limited to developing a glossary of nuclear terminologies. This represents only a partial step towards fulfilling one of 64 commitments in the Action Plan.

16. After the failure to implement the 13 steps from 2000, lack of progress on 2010's Action Plan, and the lack of an agreed outcome to the 2015 Review Conference,[9] the perception of further failure now will be a significant challenge for the NPT. The non-nuclear armed States within the NPT have a responsibility to respond to this failure. The lack of a meaningful response to non-implementation on disarmament would:

(a) put into question the practical value of any possible past, present, or future politically-binding disarmament commitment entered into by the nuclear-armed States;

(b) signal acquiescence and acceptance by the non-nuclear weapon States that the inde nite extension of the NPT equates to the indefinite possession of nuclear weapons;

(c) make the non-nuclear weapon States complicit in the collective failure of States parties to implement article VI;

(d) remove any possible remaining leverage that the non-nuclear armed States might ever have to compel the nuclear armed States (and their allies) to implement their end of the bargain; and

(e) further entrench the two-tier international system, backed by possession of nuclear weapons as the ultimate source of power and authority.

17. States should be prepared to take concrete action to fulfill the objectives of the Treaty. Each meeting of the NPT should be seen as an opportunity for non-nuclear-armed States, including those currently engaged in nuclear doctrines or extended nuclear deterrence arrangements, to declare their dissatisfaction with the status quo and indicate their intention to take action to achieve nuclear disarmament. This should be seen as fulfillment of their responsibility under article VI.[10]

18. More positively, the majority of governments have already begun to lay the groundwork for concrete action on nuclear disarmament by changing the discourse around nuclear weapons. In the context of the NPT and the General Assembly, nuclear weapons

[8] See Daniel H. Joyner, International Law and the Proliferation of Nuclear Weapons, Oxford: Oxford University Press, 2009.

[9] See Reaching Critical Will's NPT Action Plan monitoring reports at http://www.reachingcriticalwill.org/resources/publications-and-research/publications/5456-npt-action-plan-monitoring-reports and Reaching Critical Will's NPT News in Review from the 2015 Review Conference at http://www.reachingcriticalwill.org/disarmament-fora/npt/2015/nir.

[10] For a discussion of possible approaches towards implementation of Article VI, see: "Article VI of the NPT," Working Paper submitted by Ireland on behalf of the New Agenda Coalition (Brazil, Egypt, Ireland, Mexico, New Zealand and South Africa), April 2014.

are now being discussed as weapons of mass destruction rather than instruments of security. The 2010 NPT Review Conference expressed "deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons." Since then, these consequences have become a focal point for discussion and proposed action on nuclear weapons. At the 2012 NPT Preparatory Committee, 16 Governments delivered a joint statement highlighting the catastrophic humanitarian consequences of nuclear weapons and calling on all States to intensify their efforts to outlaw these weapons. At the 2012 General Assembly First Committee session 35 governments echoed this call, while at the 2013 NPT Preparatory Committee 80 countries expressed dismay with the "unacceptable harm caused by the immense, uncontrollable destructive capability and indiscriminate nature of these weapons". By the 2013 session of the General Assembly, 125 countries had endorsed this statement; by 2014 this number was up to 155; and by the 2015 NPT Review Conference, 159 endorsed the statement.

19. Three conferences were held on the humanitarian impacts of nuclear weapons: Oslo, Norway in March 2013; Nayarit, Mexico in February 2014; and Vienna, Austria in December 2014.[11] At these conferences, experts and survivors offered evidence and testimony on the effects of a nuclear weapon detonation. At the Mexico conference the Chair called for the development of new international standards on nuclear weapons, including a diplomatic process for a new legally-binding instrument.[12] At the Austria conference, the government issued a Pledge committing itself to work with others to "fill the legal gap for the prohibition and elimination of nuclear weapons."[13] Since then, 121 States have endorsed the Humanitarian Pledge. When it was adopted as General Assembly resolution[14] in December 2015, 139 States voted in favour.[15]

20. This focus on the humanitarian consequences of nuclear weapons has also brought to the fore a recognition that the stockpiling and deployment of nuclear weapons presents distinct risks of nuclear detonation, whether intentional or accidental. A number of important studies have explored nuclear "near misses" – incidents where collective luck nearly ran out and where belief in "nuclear deterrence" was revealed to be fraught with uncertainty.[16] The policy of "nuclear deterrence" requires operational plans to use nuclear weapons – in many cases within minutes of an order being given. The threat of use of nuclear weapons lingers behind the use of military force by the nuclear-armed States. Furthermore, the possibility of military engagement between nuclear-armed States is not necessarily a thing of the past. The continued possession of nuclear weapons is reflective of a world order in which a handful of States determine the fate of all of humanity.

21. Beyond the potential for political or military miscalculation, there are risks in the basic processes of storing and moving nuclear weapons. General Lee Butler, former

[11] See http://www.reachingcriticalwill.org/disarmament-fora/hinw for details.

[12] Second Conference on the Humanitarian Impact of Nuclear Weapons: Chair's Summary, Nayarit, Mexico, 14 February 2014, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/nayarit-2014/chairs-summary.pdf.

[13] Humanitarian Pledge, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/vienna-2014/humanitarian-pledge.pdf.

[14] Humanitarian pledge for the prohibition and elimination of nuclear weapons, A/RES/70/48, 7 December 2015, http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com15/resolutions/L38.pdf.

[15] See http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com15/votes-ga/48.pdf.

[16] The most recent being Eric Schlosser, Command and Control: Nuclear Weapons, the Damascus Accident, and the Illusion of Control, New York: Penguin Books, 2013; Nick Ritchie, Nuclear risk: the British Case, Article 36, 2014; Patricia Lewis, Heather Williams, Benoit Pelopidas, and Sasan Aghlani, Too Close for Comfort: Cases of Nuclear Near Use and Policies for Today, Chatham House, 2014.

Commander of United States Strategic Command (responsible for all United States nuclear weapons), has recounted several "near misses": "Missiles that blew up in their silos and ejected their nuclear warheads outside of the confines of the silo. B52 aircraft that collided with tankers and scattered nuclear weapons across the coast and into the o shore seas of Spain. A B52 bomber with nuclear weapons aboard that crashed in North Carolina, and on investigation it was discovered that one of those weapons, 6 of the 7 safety devices that prevent a nuclear explosion had failed as a result of the crash. There are dozens of such incidents. Nuclear missile-laden submarines that experienced catastrophic accidents and now lie at the bottom of the ocean.... I came to appreciate ... the enormity of the day-to-day risks that comes from multiple manipulations, maintenance and operational movement of those weapons."[17]

22. Even if the probability of deliberate or accidental detonation of a nuclear weapon is small, the potential consequences would be overwhelming. Thus beyond the moral unacceptability of such weapons as tools of human interaction, efforts to eliminate nuclear weapons must be seen as urgent given the imperative to remove this unacceptable risk.

23. The renewed attention to nuclear weapons as instruments of death and destruction rather than of security has reinvigorated global determination to prohibit and eliminate them once and for all. As yet, existing international law and institutions have proven insufficient to make such a prohibition explicit or to ensure dynamic action towards their elimination. While chemical and biological weapons are categorically prohibited and subject to specific instruments designed to achieve their complete elimination, the most destructive of all the weapons of mass destruction are not. The renewed focus on the humanitarian consequences of nuclear weapons has made this stark legal anomaly impossible to ignore.

A treaty banning nuclear weapons

24. Recognition of the catastrophic consequences that would result from a nuclear weapon detonation, in conjunction with the acknowledgement of evidence that simply possessing nuclear weapons presents a risk of detonation, poses a clear political question – what is the next best step towards the elimination of nuclear weapons? The glacial pace and indeterminate end result of nuclear force reductions, coupled with on-going modernisation processes, raises fundamental questions about how States and other actors can make significant progress towards a world free of nuclear weapons.

25. This paper argues that committed States should work together to develop and adopt an international treaty that provides a framework for the prohibition and elimination of nuclear weapons. In this section we provide an overview of a possible architecture for such a treaty and sketch out some of the key issues that it raises. It is recognized that there are alternative suggestions to the type of treaty proposed here and so this section goes on to consider and compare some of those in the light of the analysis presented below.

Principles and potential elements of a ban treaty

26. For the purposes of this paper, banning nuclear weapons would entail the development of an international legal instrument that would prohibit its parties, their nationals, and any other individual subject to its jurisdiction from engaging in any activity related to the use, development, production, stockpiling, transfer, acquisition, deployment, and financing of nuclear weapons, as well as assistance with these acts under any circumstances. It should provide a framework for the elimination of nuclear weapons within agreed timeframes for those States with nuclear weapons that join. Furthermore, it should

[17] General G. L. Butler, Address to Canadian Peaceworkers, Ottawa, 11 March 1999.

recognize the responsibilities of States to ensure the rights of victims of nuclear weapon use or testing, require decontamination and remediation of affected areas, and provide for cooperation and assistance to meet these obligations.

27. Whilst the treaty's prohibitions should be clear up front, certain details of implementation could be agreed later by States working under the framework that it provides. For example, technical provisions relating to processes for the verified elimination of stockpiles could be negotiated and agreed subsequently by state parties as required after the treaty has entered into force. Such an approach might be helpful because it would allow the instrument to be developed in the short term by committed States, while recognizing that nuclear-armed States not necessarily participating initially would have particular interests in crafting such provisions. Leaving such components open for more detailed delineation in the future might also avoid those specific elements being held up later by some States as excuses not to join the treaty.

28. The following is a discussion of some principles that could guide the treaty's development and some potential elements that could be included in order to establish an effective framework for achieving and maintaining a nuclea. weapons free world.

29. Drawing upon the UN General Assembly resolution that led to negotiations of the NPT,[18] the ban treaty could be based on principles such as:

(a) establishing a clear legal standard to prohibit nuclear weapons based on their unacceptable consequences, in the same way as the other weapons of mass destruction have been prohibited through specific instruments;

(b) recognizing the value of action taken amongst committed States in the short-term, even without the participation of the nuclear-armed States;

(c) building on the various norms that exist within the nuclear weapon free zone treaties to prohibit and promote the elimination of nuclear weapons;

(d) being non-discriminatory and not recognizing any distinction amongst its parties;

(e) supplementing existing legal instruments without resulting in a situation where States, through participating in a ban treaty, are subject to less stringent obligations than the NPT;

(f) closing loopholes in the existing nuclear regime that permit States to engage in nuclear weapon activities or to otherwise claim benefit from the continued existence of nuclear weapons; and

(g) aligning non-proliferation policies with disarmament objectives without prejudice to the integrity of overall objectives of the nuclear non-proliferation regime.

30. In accordance with these principles, the treaty would likely contain specific prohibitions against nuclear weapon-related activities, ranging from research to use. The principles of the treaty should be oriented toward establishing effective measures for the realization of nuclear disarmament, the cessation of the nuclear arms race, and the maintenance of a world free of nuclear weapons.

(a) **Use and threat of use**. The ban treaty could introduce, for the first time, a universal prohibition under international treaty law against the use and threat of use of nuclear weapons. Some of the nuclear weapon free zone treaties include such a prohibition by contracting parties while their protocols prohibit the NPT nuclear-armed States from

[18] Non-Proliferation of Nuclear Weapons [1965] UNGARsn 33; A/RES/2028 (XX) (19 November 1965).

using nuclear weapons against countries within the zones. But these latter prohibitions are subject to reservations and conditions by those nuclear-armed States. The ban treaty could categorically prohibit its parties from participating in any act related to the use of nuclear weapons. This would also affect arrangements of extended nuclear deterrence, at the essence of which is coordination for the use or threat of use of nuclear weapons. It would not be advisable for interested States to pursue negative security assurances within the context of a ban treaty, since such a provision would signal conditional acceptance of the possession of nuclear weapons by States outside the treaty.

(b) **Development and production**. The ban treaty could seek to close a loophole in the NPT that allows States to do everything except manufacture or acquire a fully assembled nuclear weapon. A prohibition on development of nuclear weapons and delivery systems could preclude research on nuclear weapons and the testing of nuclear weapons systems, including subcritical and other means of testing. The ban treaty could also go beyond the NPT through a blanket prohibition on manufacturing or otherwise producing nuclear weapons. The NPT, in articles I and II, only prohibits non-nuclear-armed States parties from manufacturing nuclear weapons and from receiving assistance to do so, and prohibits nuclear-armed States from assisting, encouraging, or inducing any non-nuclear-armed state to manufacture or otherwise acquire nuclear weapons. The ban treaty could make the production of nuclear weapons illegal for all States parties. It could also prohibit States parties from participating financially or otherwise in the production of nuclear weapons (see below). Following such principles would close loopholes in existing international law regarding nuclear testing, strengthen non-proliferation, and also help to address concerns around the nature of nuclear programmes involving dual-use technologies or in countries that have domestic uranium enrichment or plutonium reprocessing capacities. A treaty-based prohibition on development and production would promote confidence in the maintenance of a nuclear weapons free world.

(c) **Transfer or acquisition**. Article II of the NPT limits States from receiving nuclear weapons or taking control over such weapons; the ban treaty would do the same. Negotiating States should also consider whether or not the ban treaty should prohibit transit of nuclear weapons through the territory of States parties.

(d) **Stockpiling**. The ban treaty, unlike the NPT, could categorically prohibit the stockpiling of nuclear weapons by States parties. For countries that are already nuclear weapons free, the commitment not to possess these weapons would simply be a reaffirmation of their obligations under the NPT, relevant nuclear-weapon-free-zone treaties, or national legislation. For nuclear-armed States, a ban treaty could provide for them to join the treaty and to accept an obligation to eliminate their arsenals as soon as possible and within agreed timeframes. The ban treaty would not need to pre-negotiate these provisions, but could see them agreed by States parties as part of the implementation of the instrument. For those nuclear-armed States outside of the treaty, other treaty prohibitions such as those on assistance with prohibited acts could affect their incentives to continue possessing nuclear weapons (see below). This of course would depend upon the effective implementation of the treaty by States parties.

(e) **Deployment**. The NPT does not prohibit the deployment of nuclear weapons. This has allowed its nuclear-armed States parties to maintain active stockpiles of nuclear weapons at varying levels of alert. It has also allowed some of their allies to maintain active stockpiles of nuclear weapons on their territories with the capability of taking possession and using these weapons within minutes. The ban treaty could prohibit operational deployment by nuclear-armed States parties and could require them to immediately take their weapons o deployment as part of their stockpile elimination plans. And, as with the provisions of several nuclear weapon free zone treaties, a ban treaty could prohibit its States parties from receiving, storing, installing, or accepting deployment of nuclear weapons on

their territories. These practical obligations, in conjunction with the prohibition on use, would effectively prevent the threat of use of nuclear weapons, as well as reduce the risks of accidents or illicit acquisition of nuclear weapons or materials.

(f) **Assistance with prohibited acts**. The ban treaty could require States parties not to assist, encourage, or induce any state, directly or indirectly, in undertaking any act prohibited under the treaty. Such a principle would be important for bringing the treaty to bear even on States that stand outside it. It could compel States to revise aspects of their relationships with nuclear-armed States – making nuclear weapons problematic rather than normal. A prohibition on assistance with prohibited acts could explicitly include a prohibition on any form of financial or material support to public and private enterprises involved in nuclear weapons activities. Such a prohibition could increase the societal stigmatization of nuclear weapons by reducing the incentives for private companies to accept any work related to nuclear weapons. It could also compel public funds and foundations from supporting any entity involved in nuclear weapons activities.[19] In this regard, a treaty ban on nuclear weapons could raise the political and economic costs of maintaining nuclear weapons. However, the treaty could exempt the funding of activities deemed necessary to meet other obligations under the treaty, such as disarmament and securing weapons and related facilities and materials, while meeting stockpile elimination obligations.

31. As a framework for maintaining a nuclear weapons free world, the ban treaty could also include positive obligations for – parties. Potential principles could include measures related to the rights of victims, decontamination, and cooperation and assistance.

(a) **Rights of victims**. The treaty could articulate the responsibility of States parties to ensure the rights of victims of nuclear weapons – whether from use, accidental detonation, or from weapons testing—and to provide necessary assistance in this regard. Such an obligation would build on the legal developments that have taken place on conventional weapons regulation and in areas such as the rights of persons with disabilities in the period since the other treaties prohibiting weapons of mass destruction were adopted.

(b) **Decontamination and remediation**. The detonation of a nuclear weapon, whether in conflict or testing or by accident, creates distinct and challenging patterns of long-term contamination. States parties to a ban treaty could recognize a responsibility to protect their populations from any such contamination through necessary measures to exclude populations from the area and, over time, through processes of decontamination and remediation. Whilst recognising that nuclear contamination presents distinct technical challenges, such a principle is important to make the threat and the reality of harm from nuclear weapons a thing of the past.

(c) **Cooperation and assistance to meet the obligations of the treaty**. Recognizing the different circumstances of States, and the uncertainty of circumstances in the future, the ban treaty could provide a framework for international cooperation and technical assistance for those working to meet its obligations.

32. The ban treaty could also address a variety of other issues, such as military cooperation and verification. However, the framework of the treaty might need to leave the details of such provisions to subsequent negotiations among States parties.

[19] There is already evidence of financial institutions shunning producers of nuclear weapons. In Norway for example the sovereign wealth fund rejects investment in nuclear weapon producing companies. See Don't Bank on the Bomb, PAX, 2013. These practices of avoiding investment would be likely to increase once a treaty prohibition has been put in place at the national level.

(a) **Military cooperation**. While participation in military alliances that include nuclear-armed States would not be prohibited, the treaty should require States parties not to participate in any act prohibited under the treaty. In this regard, States parties that belong to alliances that envision the use of nuclear weapons could be obliged to effectively renounce their participation in any doctrine or policy involving the stockpiling, deployment, use, or threat of use of nuclear weapons. While joining the ban treaty would not necessarily have to require any state to exit its alliance, this principle could compel them to ensure that their participation is compatible with their commitments and policies under the ban treaty.[20] Similarly, any bilateral arrangement involving hosting of nuclear weapons would likely need to be revisited. The ban treaty could make it clear that nuclear weapons are illegal and States parties cannot plan to benefit from or support their use or continued possession. In this regard, relationships of extended "nuclear deterrence," in which a nuclear-armed state pledges to use nuclear weapons to "protect" an ally, would likely need to be renounced by States parties.

(b) **Verification**. Verification of some of the treaty's provisions could, at least initially, be based on existing IAEA safeguards and the CTBTO. These mechanisms could deal with material accountancy and controls and detection of nuclear tests. However, existing safeguards, even with the additional protocol for enhanced IAEA safeguards, might still provide an insufficient degree of assurance against the possibility that a state could break out of the regime and acquire a militarily significant nuclear capability without detection. Furthermore, some of the provisions outlined above could require new verification measures in order to ensure the effective maintenance of a nuclear weapon free world and to achieve nuclear disarmament. This would, among others, include measures to verify elimination of nuclear weapons. Some disarmament activities, such as the irreversible removal of fissile material, can be based on or easily adapted to existing arrangements and implemented through existing organizations. Others, like the withdrawal and dismantlement of warheads and delivery vehicles, will require new arrangements and international institutions. Important work has been undertaken by organizations such as VERTIC in cooperation with Norway and the United Kingdom to consider how verification of nuclear disarmament might work.[21] The International Panel on Fissile Materials has also considered the technical aspects of nuclear disarmament.[22] This work could be drawn upon during the implementation of a ban treaty. Mechanisms for the verification or enforcement of the ban treaty's provisions could be negotiated along with the basic treaty framework or subsequently, in future meetings of States parties. One option, following the model of the Chemical Weapons Convention, could be for the ban treaty to establish a preparatory commission, which could be used to resolve outstanding issues and establish implementation and verification mechanisms.

Other approaches to the elimination of nuclear weapons

33. As noted earlier, the type of treaty outlined above is one of a number of options that might be considered by the international community. This paper advocates for this approach because of its logical and legal coherence, its breadth of scope, and its relative

[20] Stein-Ivar Lothe Eide, "A ban on nuclear weapons: what's in it for NATO?" International Law and Policy Institute, Policy Paper No 5, January 2014.

[21] For a collection of publications and presentations on this work, see VERTIC's website http://www.vertic.org/pages/home- page/programmes/verification-and-monitoring/multilateral-disarmament-verification.php.

[22] "Increasing Transparency of Nuclear-warhead and Fissile-material Stocks as a Step Toward Disarmament: A Preliminary Set of Proposals by the International Panel on Fissile Materials", International Panel on Fissile Materials, presented at the meeting of the First Preparatory Committee for the 2015 Nuclear Non-Proliferation Treaty Review Conference, Vienna, 3 May 2012.

achievability. The segments below briefly review some of the other proposed options in the context of the instrument described above.

34. **A regulation of nuclear weapons based only on the prohibition of use**. There is currently no universal prohibition against the use of nuclear weapons. Some governments and civil society organizations have advocated for a no-use regulation, arguing that it might be more achievable than a comprehensive ban on nuclear weapons. Proponents of this approach also suggest that once a nuclear-armed state has agreed never to use nuclear weapons it is signaling its readiness to live in a nuclear weapons free world.

35. However, a regulation that proscribed only the use of nuclear weapons might be no more achievable than a comprehensive ban. It is likely to face strong opposition from the nuclear-armed States as well as their "nuclear-dependent" allies, for whom belief in nuclear deterrence requires some credible threat of use. This was made clear by nuclear-armed States during the 1996 case on nuclear weapons at the International Court of Justice. The resistance of some nuclear-dependent States to the inclusion of language against the use of nuclear weapons "under any circumstances" in the joint statements on the humanitarian impact of nuclear weapons presented at recent NPT and General Assembly meetings also suggests that such States are not ready to accept a categorical prohibition on the use of nuclear weapons.

36. The argument that an agreement to renounce use of nuclear weapons will lead to renunciation of nuclear weapons is also questionable. A potentially problematic outcome of a regulation of nuclear weapons focused on use would be that it appears to entrench the legitimacy of indefinite possession and further removes political pressure for disarmament. A prohibition on use also risks being co-opted as an end in itself, rather than serving as a means to an end.

37. Elimination must be the central consideration of any initiative on nuclear weapons. This principle tenet is lost through efforts that seek partial measures, such as a regulation against use. A no-use agreement would act merely as a restriction on nuclear weapons, rather than categorically rejecting them. This would provide less leverage and stigmatizing power than a comprehensive ban treaty establishing a clear legal standard (see chapter three on potential effects of a treaty for details on the potential stigmatizing power of a ban treaty).

38. If States are willing to accept that it is illegal to use a weapon, then they should also accept that the production and stockpiling of such weapons, amongst other acts, is also illegal. Indeed, possession of nuclear weapons is underpinned by a commitment to nuclear deterrence, which requires policies and planning to use nuclear weapons. It is difficult to separate the possession of nuclear weapons from the threat to use them. The more comprehensive set of prohibitions provided by a ban treaty, which includes a categorical prohibition on use, is more morally and logically coherent.

39. It is also worth considering the limited role available to non-nuclear-armed States in a regulation of nuclear weapons that only applies to their use. A no-use regulation would apply only to States possessing nuclear weapons. In contrast, a treaty banning nuclear weapons has roles and responsibilities for all States and would be meaningful even without the participation of nuclear-armed States. This has serious implications for the feasibility of negotiating such an instrument.

40. Finally, a prohibition on the use of nuclear weapons would not bring international law on nuclear weapons into line with that on the other weapons of mass destruction in the same way that a comprehensive ban treaty would. The treaties on chemical and biological weapons prohibit not only use but also stockpiling, production, and so on. Placing nuclear

weapons under a comprehensive prohibition alongside the other weapons of mass destruction is a valid aspiration of many governments at this time.

41. **The model nuclear weapons convention**. Many civil society groups and governments have called for the negotiation of a nuclear weapons convention, which has been conceived of as a treaty providing for the time-bound, transparent, verifiable, and irreversible elimination of nuclear weapons. A model convention was produced by civil society in 1997 and updated in 2007.[23] This model has been submitted to the General Assembly and the NPT review process as an official document by the governments of Costa Rica and Malaysia. This model is an important document, illustrating potential mechanisms to overcome the complex challenges involved in multilateral nuclear disarmament.

42. A treaty banning nuclear weapons is not inconsistent with a nuclear weapons convention. A ban treaty, in comprehensively prohibiting the use, possession, and stockpiling of nuclear weapons, provides a framework for the total elimination of nuclear weapons. However, negotiations of the ban treaty would not necessarily need to pre-determine the exact mechanisms and procedures by which the nuclear-armed States would undertake the process of elimination. By leaving these arrangements open, the ban treaty would avoid any such provisions being held up as an excuse not to join by nuclear-armed States. This does not preclude nuclear-armed States from drawing upon the provisions of the model convention if they choose to do so.

43. The difference between the process to establish a treaty banning nuclear weapons and an instrument along the lines of the model convention is that the latter places the onus on the nuclear-armed States to lead the process. Under prevailing domestic and international political circumstances, the nuclear-armed States are unlikely to support *en masse* any serious efforts towards the prohibition and elimination of nuclear weapons in the foreseeable future. The nuclear-armed States and some of their allies frame the convention as a possible final step in a decades-long process at best, and at worst, an always-out-of-reach "vision". Either way, the convention is viewed by these States as a long way off. Even amongst the States that promote the near-term negotiation of a nuclear weapons convention, many have proposed that work take place only within the Conference on Disarmament. Progress in that forum seems unrealistic against the background of an eighteen-year failure to adopt a programme of work and a deeply embedded culture of geopolitical posturing.

44. **A step-by-step approach**. The so-called "step-by-step" approach to nuclear disarmament emerged initially in the 1950s, as a response to the deadlock reached between the Soviet Union and the United States in their negotiations aimed at the regulation, limitation, and balanced reduction of all armed forces and all armaments. Nuclear disarmament was always considered an early objective of any general disarmament process and was to have been achieved as an early part of the process either in a single or multiple States. A shift to partial measures occurred in 1957, through which nuclear disarmament was to have been achieved in phases pursuant to a single agreement.[24]

45. However, in 1977, the first special session of the General Assembly devoted to disarmament established that nuclear disarmament should be achieved pursuant to separate

[23] Securing Our Survival: The Case for a Nuclear Weapons Convention, International Physicians for the Prevention of Nuclear War, International Association of Lawyers Against Nuclear Arms, International Network of Engineers and Scientists Against Proliferation, 2007, http://www.inesap.org/book/securing-our-survival.

[24] See Michael Spies, "The Emergence of Partial Nuclear Disarmament and the Step-by-Step Approach," ACUNS/ASIL Summer Workshop on International Organization Studies, Vienna, 20–26 July 2013.

agreements providing for partial disarmament measures.[25] These steps included cessation of qualitative improvements, development, and production of nuclear weapon systems; cessation of the production of fissile materials for weapons purposes; an end to nuclear testing; and a phased programme for reductions and ultimate elimination of nuclear weapons.

46. Over the past three and a half decades, the various intermediate steps have become obsolete, superfluous, or irrelevant. For example, a de facto nuclear testing moratorium is observed by most nuclear-armed States, and most sites for the conduct of nuclear testing and production of fissile material in the five NPT nuclear-armed States have been dismantled or otherwise have not operated in decades. The sole pertinent objective of the original step-by-step process remains a comprehensive, phased programme with agreed timeframes for progressive and balanced reduction of stockpiles of nuclear weapons and their means of delivery, leading to their ultimate and complete elimination at the earliest possible time. Yet there have been no negotiations on such nuclear disarmament since 1965.

47. Continued insistence on the step-by-step approach becomes problematic when it prevents progress, especially when lack of agreement on one obsolete step is used as pretext for no progress at all and when it serves to legitimize the continued possession of nuclear weapons in the meantime. This constructed legitimacy relies in part on framing the commitment to the step-by-step approach as "good faith" under the NPT. Yet Article VI of the NPT, currently the only legally-binding commitment to negotiations on nuclear disarmament, does not specify a step-by-step approach. While NPT outcome documents from 1995, 2000, and 2010 outline a variety of steps, the principles and objectives outlined in 1995 make it clear that these are not necessarily exhaustive or sequential lists.[26] Thus the continuous reaffirmation of the step-by-step process is unhelpful, not least because the specific political processes through which it is to be realised are deadlocked, including by the actions of the nuclear-armed States themselves.

48. Most of the incremental steps that have been agreed to over the past decades have not been implemented and the actions of some nuclear-armed States have actually resulted in steps backwards. Rather than insisting on continuing down this same, stalemated path, it would seem more fruitful to try some new approaches. In this regard, one compelling option could be for like-minded States that are committed to the logic of nuclear disarmament to take greater responsibility and exercise greater political agency to realize a nuclear weapons free world.

49. A ban treaty can work alongside and support other efforts. Even if one were to accept that existing efforts are on the right track, efforts to negotiate a ban treaty should be seen as complementary, not contradictory. Embarking on a process to develop a treaty banning nuclear weapons would not preclude work continuing on other aspects of the established disarmament and arms control agenda such as a fissile material ban treaty or work on the prevention of an arms race in outer space.

50. Indeed, negotiations on a treaty banning nuclear weapons could even help to unlock some of the impasses that have appeared so intractable in the recent past by motivating States to take action and demonstrating that progress is in fact possible. A ban treaty could facilitate disarmament in a domestic political context, by helping political leaders keen on elimination to overcome pressures from industrial and commercial interests that are heavily invested in nuclear weapons.

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[25] Final Document of the Tenth Special Session of the General Assembly, S-10/2.

[26] See John Borrie and Tim Caughley, "After Oslo: Humanitarian Perspectives and the Changing Nuclear Weapons Discourse," UNIDIR, 2013.

Making it happen – how a ban treaty can be done

51. Initiating negotiations towards a treaty banning nuclear weapons will rely on States and organizations having confidence that such a process is feasible and that the resulting treaty would have a tangible positive impact on disarmament efforts. This section offers a rationale for the feasibility of a process to ban nuclear weapons. The next section considers what the impact of that treaty would be.

Developing a ban treaty without the nuclear-armed States

52. "In a memorable scene from Stanley Kubrick's Dr. Strangelove, the protagonist, General Jack D. Ripper, twists a quote by George Clemenceau and argues that war has become "too important to be left to politicians." An appropriate adaptation of the quote for our time is that the risks associated with nuclear war have become too important to be left to the nuclear-armed States. In the field of nuclear arms control, the non-nuclear-weapon States have for decades served the role of moralizing spectators with little real influence. Judging by recent developments, however, the non-nuclear-weapons States are slowly realizing that a world without nuclear weapons will not come about unless they do something about it themselves."[27]

53. A key question regarding the feasibility of a ban treaty relates to the role of the nuclear-armed States and, to some extent, the nuclear-dependent States. To treat nuclear-armed States as essential participants in any negotiations on nuclear weapons is to give them a decisive voice over the initiation, scope, pace, and the success or failure of such a process. A treaty prohibition on nuclear weapons need not rely on the participation of nuclear-armed States, but building confidence amongst committed States that there is legitimacy, relevance, and transformative potential in pursuing a treaty prohibiting nuclear weapons without possessors is an important ongoing task. This section looks at some of the reasons why moving forward without the nuclear-armed States is necessary and considers some of the implications of that.

54. Until recently, discussions and initiatives related to nuclear weapons have been dominated by the nuclear-armed States, the behaviour of which serves to entrench nuclear weapons in security doctrines, reinforce commercial and industrial relationships with nuclear weapons production, and undermine the objective of elimination. The limited nuclear weapon reductions that have taken place have largely been about "retiring" warheads from bloated Cold War arsenals rather than any fundamental rethinking of nuclear "deterrence" and the collective dangers of a nuclear-armed world. The pursuit of further arsenal reductions are being undermined by ongoing efforts to upgrade and modernize nuclear arsenals, while the development of ballistic missile "defence" systems and Prompt Global Strike capabilities has been used as a pretext for claims that nuclear disarmament is impossible under current circumstances. This context provides little basis for confidence that nuclear-armed States are working in good faith to eliminate nuclear weapons.

55. The five NPT nuclear-armed States refused to participate in the conferences on the humanitarian impact of nuclear weapons in Norway or Mexico and the open-ended working groups on nuclear disarmament in 2013in Geneva. France, the United Kingdom, and the United States issued joint statements disparaging both initiatives as well as the high-level meeting on nuclear disarmament hosted by the United Nations on 26 September 2013 as

[27] Gro Nystuen and Stein-Ivar Lothe Eide, "Wanted: resolute normative leadership," European Leadership Network, 5 September 2013.

"distractions" from "ongoing" work on nuclear arms control.[28] Russia has argued that the international community should not "waste time on such useless topics" as the humanitarian consequences of nuclear weapons and that those who pursue initiatives promoting nuclear disarmament outside the agreed framework are "radical dreamers" who have "shot off to some other planet or outer space".[29]

56. The NPT nuclear-armed States call for implementation of the Action Plan adopted at the 2010 NPT Review Conference, suggesting that any activities not explicitly sanctioned by that plan will distract and detract from "progress" on the steps articulated in that plan – which are largely based on steps that have been on the agenda since the 1950s. Yet, as argued above, continued insistence on the step-by-step approach prevents any progress at all, as the stalemate in the Conference on Disarmament and other traditional nuclear weapons forums have demonstrated.

57. Work on fully implementing the Action Plan should continue and efforts be redoubled to meet these commitments. However, such work should not be seen as preventing States from embarking on other complementary initiatives, such as a treaty to prohibit nuclear weapons. [30] It should also be recognized that failures to effectively implement the Action Plan will need to be met with resolve for concrete action by non-nuclear-armed States so as to avoid further entrenchment of the status quo of the indefinite possession of nuclear weapons. Very importantly for States parties to the NPT, it is the responsibility of all States to make progress towards negotiations on nuclear disarmament.

58. There seem to be several sets of reasons why States may instinctively insist on participation of nuclear-armed States in any process to ban nuclear weapons:

(a) That such negotiations would be incompatible with existing security and defence arrangements;

(b) That any prohibition undertaken without the nuclear-armed States will have no impact on them, may let them o the hook in terms of disarmament, or may serve to entrench their commitment to such weapons;

(c) That negotiations of a ban would be antagonistic towards the nuclear-armed States and would receive severe pushback; and

(d) That despite rhetorical aspirations towards a world without nuclear weapons, some allies of the nuclear-armed States feel a commitment to maintaining the status of these weapons.

59. The first two sets of concerns are addressed in more detail in the subsequent section on the impact of a ban treaty. The second two are addressed here.

60. **Pressure from the nuclear-armed States**. Given existing commitments to nuclear weapons, the pressure that nuclear-armed States will apply to their friends and allies should not be underestimated. Political leaders may be faced with threats of repercussions should they pursue a ban treaty. These could relate to wider defence and security cooperation or bring in other aspects of bilateral relations including trade and industry. Resisting this opposition from the nuclear-armed States will be a challenge. It will rely on resolute leadership from political leaders and senior officials. These individuals will need support from civil society, parliaments, and the media.

[28] Statement to the high-level meeting on nuclear disarmament on behalf of France, the United Kingdom, and the United States, delivered by the United Kingdom, New York 26 September 2013; Statement to the UNGA First Committee on behalf of France, the United Kingdom, and the United States, delivered by France, New York, October 2013.

[29] Statement to the UNGA First Committee by Russia, 22 October 2013

[30] NPT Action Plan Monitoring Report 2013, Reaching Critical Will, March 2013.

61. There is no reason to believe, though, that this pressure should be irresistible. States frequently disagree on important topics and yet still find ways to maintain constructive relations. This holds true including in cases where there are strong differences on nuclear weapons. In the case of New Zealand and the United States, differences over nuclear weapons have not prevented the two countries maintaining strong bilateral relations. The recent agreement by the two countries to restore full military cooperation has been made despite the continued prohibition on nuclear-armed or nuclear-powered vessels entering New Zealand's territory (see the section on national legislation for details).

62. A treaty banning nuclear weapons should not be seen as antagonistic towards nuclear-armed States. Rather it should be seen as an effort to assist those States that find themselves caught up in a complex situation of conflicting legal norms (where the use of nuclear weapons cannot be reconciled with the rules of international humanitarian law); embedded national identity politics (where the power and prestige associated with nuclear weapons plays a role in constructing the national identity of certain States); longstanding commercial and industrial relationships with nuclear weapon production; and questionable belief in "nuclear deterrence". A treaty framework to prohibit and eliminate nuclear weapons, by contributing to international stigmatization and rejection of these weapons, should be seen as supportive to genuine efforts by leaders within nuclear-armed States to disentangle themselves from a situation that puts them and our wider human society at great risk.

63. **Interest in maintaining the status of nuclear weapons**. Some nuclear-armed state allies that incorporate nuclear weapons into their security doctrines have argued that "simply" banning nuclear weapons will not guarantee their elimination. They use some of the arguments cited above as reasons for why the ban treaty is an impractical or irresponsible pursuit.

64. But underlying these arguments is a commitment to maintaining the status of nuclear weapons. The failure of the step-by-step approach or nuclear-armed States initiatives to adequately address the challenge of nuclear weapons should provide inspiration and determination to take additional actions. Yet these States are hesitant to embrace new initiatives, despite the renewed attention internationally to the humanitarian catastrophe that would be caused by a nuclear weapons detonation. Some have called for recognition of the "security" dimension of nuclear weapons alongside humanitarian concerns,[31] even though the risk of catastrophic nuclear violence is intrinsic to the practice of nuclear "deterrence" and the existence of the weapons.

65. Banning nuclear weapons is a pragmatic way to confront this risk and is a logical evolution of nuclear disarmament discourse and process. Resistance to the idea is rooted in ideological commitment to a framing of nuclear weapons as tools of security in the midst of existential crisis. Indeed, many nuclear-armed States, as well as other nuclear-dependent States, are likely to be critical of the ban treaty approach precisely because they recognize the stigmatising impact it would have and so want to prevent it from being pursued. A legal ban would affect their national policies and how they are seen internationally, so they perceive an interest in stopping it. This suggests that such a treaty would increase pressure on the nuclear-armed and nuclear-dependent States (which speaks against the second of the concerns highlighted above).

[31] Statement to the First Committee of the General Assembly of the United Nations on behalf of Australia, Belgium, Canada, Finland. Germany, Italy, Japan, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Spain, Sweden, and Turkey, delivered by Australia, New York. 21 October 2013.

Forums for negotiation

66. It is worth recognizing that there is significant diversity of negotiating practice in multilateral treaty development. Some treaties are developed by consensus;[32] others are not. Some are negotiated in standing United Nations forums; others are developed and adopted outside of established bodies. Sometimes, such as in the case of the Chemical Weapons Convention, the adoption of the treaty does not signal the end of negotiations – work on specific provisions may continue in meetings of States parties or other institutional arrangements.

67. The following outlines a variety of forums and processes through which multilateral treaties have been negotiated and adopted.

68. The rule for United Nations General Assembly-mandated treaty negotiations is for adoption by majority vote if consensus is not possible. The Arms Trade Treaty was negotiated within a conference established by the General Assembly; when a few States blocked its adoption within the conference, the treaty text was sent to the General Assembly for a vote, where it was adopted. The Comprehensive Test Ban Treaty was negotiated within the Conference on Disarmament (CD), but when member States were not able to adopt the treaty by consensus as mandated by CD rules of procedure, it was taken to the General Assembly for a vote. Similarly, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) was first addressed in the precursor to the CD during the 1970s. Negotiations in that body resulted in a text in 1976 that was sent to the General Assembly and approved by a vote.

69. The International Convention on the Suppression of Acts of Nuclear Terrorism was unanimously approved by the General Assembly after it was elaborated in an ad hoc committee, but only after several countries, including the United States, withdrew certain amendments.[33]

70. The issue of chemical weapons was first introduced to the CD's precursor in 1968 by Sweden. Several drafts were tabled during the 1970s and a US-Soviet working group was established to discuss key elements of a future convention. In 1978, the CD established an ad hoc committee on chemical weapons. Negotiations continued until 1992, when the draft convention was adopted by the CD and endorsed by the General Assembly. Recognising that a number of outstanding issues remained despite the treaty's adoption, when the treaty opened for signature in 1993 signatory States adopted a resolution establishing the Preparatory Commission for the Organization for the Prohibition of Chemical Weapons.[34]

71. The Chemical Weapons Convention is not the only treaty in which negotiations on key provisions continued after the treaty's adoption. After the United Nations Framework Convention on Climate Change was adopted in 1992, contracting parties have continued to

[32] There are also different interpretations of consensus, with some states arguing, in the context of the Conference on Disarmament for example, that consensus means absolute unanimity on all decisions related to both process and substance. Others, however, argue that consensus is a process through which all good faith efforts are made to reach agreement, but that no single state or small group of states can block progress for everyone.

[33] International Convention on the Suppression of Acts of Nuclear Terrorism, Nuclear Threat Initiative, http://www.nti.org/trea- ties-and-regimes/international-convention-suppression-acts-nuclear-terrorism/

[34] "Genesis and historical development", Organization for the Prohibition of Chemical Weapons, https://www.opcw.org/chemical-weapons-convention/about-the-convention/genesis-and-historical-development/

negotiate decisions and agreements to advance its implementation and to strengthen parties' commitments and obligations.[35]

72. The treaties banning antipersonnel landmines and cluster munitions were negotiated through ad hoc processes established by groups of United Nations Member States after existing forums proved incapable of appropriately addressing these issues. After the 1996 amendment of Protocol II of the Convention on Conventional Weapons (CCW) failed to include a prohibition of antipersonnel landmines, 40 governments initiated action to ban the weapon entirely, working closely with United Nations agencies, international organizations and civil society. The Mine Ban Treaty was developed throughout a series of meetings hosted by governments and was adopted in 1997 in Oslo, Norway and signed in Ottawa, Canada.[36] The Mine Ban Treaty was welcomed by the General Assembly after its adoption. The Convention on Cluster Munitions was similarly developed through meetings attended by likeminded governments, United Nations agencies, international organizations and civil society groups. It was adopted in Dublin, Ireland in 2008 and signed in Oslo that same year[37].

73. Initiatives launched by likeminded groups of States should not be seen as lacking legitimacy. In international negotiations it has been natural for likeminded States – often supported by civil society and international organizations – to take the lead by putting an issue on the agenda, undertaking advocacy with other States, and fulfilling functions such as drafting, chairing, and facilitating negotiations. In recent years, the development of the Framework Convention on Climate Change, the International Criminal Court, the Framework Convention on Tobacco Control as well as the prohibitions on landmines and cluster munitions, are all examples of processes in which a group of States took responsibility for proposing an initiative and undertaking the bulk of the diplomatic work to bring it to fruition.[38]

74. Engaging in such a process related to nuclear weapons should be seen no differently. In this regard, it is useful to recall that numerous existing initiatives on non-proliferation and nuclear security have been established by likeminded States independently of traditional UN forums or procedures. The Global Initiative to Combat Nuclear Terrorism, the G8 Global Partnership Against the Spread of Weapons and Materials of Mass Destruction, the Proliferation Security Initiative, and the Nuclear Security Summits represent ad hoc, likeminded processes established by States trying to address specific concerns related to nuclear weapons. Such initiatives are not branded as undermining existing forums for work on nuclear weapons.

75. There should be flexibility about the forum in which negotiations take place. There are advantages and disadvantages to the different options in this regard. Existing forums come with their own cultures, dynamics, and rules. Some are either not open to all States or operate only by consensus and as such would be unsuitable.[39] Nevertheless existing forums such as the United Nations General Assembly do offer a venue with which all States have longstanding experience and some common understandings.

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[35] "Issues in the negotiating process: A brief history of the climate change process," United Nations Framework Convention on Climate Change, http://unfccc.int/cop7/issues/briefhistory.html

[36] "Ban History", International Campaign to Ban Landmines, http://www.icbl.org/index.php/icbl/Treaty/MBT/Ban-History

[37] Cluster Munition Coalition, www.stopclustermunitions.org.

[38] For an analysis of different multilateral processes, including the role of core groups, see J. Borrie and V. Martin Randin (eds), "Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action," UNIDIR, 2005, pp. 105–106.

[39] The Conference on Disarmament, for example, rules itself out on both these criteria.

76. On the other hand, it has been possible to develop international treaties through ad hoc processes that are open to all States and that use accepted rules of procedure, but that do not rely on an existing multilateral mechanism. Such processes offer greater flexibility, but can require some additional resources and have been challenged by opponents on the basis that they are taking place outside their preferred negotiating arenas.

77. Regardless of the forum in which it is convened, a treaty process should be open to all States and inclusive of civil society and international organizations. Negotiations should draw from the usual procedures of the United Nations General Assembly, with recourse to voting if efforts to reach consensus are exhausted and the Vienna Convention on the Law of Treaties, which envisages the adoption of a treaty text "by the vote of two-thirds of the States present and voting". Most importantly, the goals of the process should determine the means – those wishing to take negotiations forward will need to consider what kind of process, in which forum, would best serve the objective of a ban treaty.[40]

The nuclear weapon free zones as regional ban treaties

78. The development of the Treaty of Tlatelolco, which preceded the NPT, established the important principle that a group of States – in this case organised on a regional basis – can develop a treaty to prohibit nuclear weapons.[41] Since the adoption of the first nuclear weapon free zone treaty, four further such zones have been established by international treaties.

79. The nuclear weapon free zones can be seen as reflecting a decision by non-nuclear-armed States to take responsibility for prohibiting and eliminating nuclear weapons. There is no doubt that these zones have been motivated in large part by an interest in maintaining and enhancing the security of the countries involved and of their regions as a whole. Indeed, each of the regional treaties has an additional protocol seeking "negative security assurances," whereby nuclear-armed States promise never to use their weapons against a member of the treaty. At the same time, the preambles of the treaties make clear the determination to achieve disarmament and eliminate nuclear weapons, not only in their regions, but for the whole world.[42]

80. The Treaty of Tlatelolco, adopted in 1967, was the result of tough negotiations undertaken without the nuclear-armed States. A previous Costa Rican proposal for the denuclearisation of Latin America and the Caribbean had been unsuccessful because it was seen as reinforcing US in influence in the region.[43] While the US supported the negotiation of the Treaty of Tlatelolco, it was not directly involved in the negotiations themselves. The Treaty of Tlatelolco is also an example of States' willingness to act as a group even without all potentially relevant States on board. Argentina and Brazil were sceptical during the negotiations of measures that they perceived as limiting their sovereignty. Argentina, Brazil, and Chile ratified the treaty only in 1994, with Cuba the last to ratify in 2002.

81. Similarly, Mongolia's declaration of its territory as a single state nuclear weapon free zone is an example of a state's determination to take action as an individual state, even though its neighbours were not in a position to join such a zone. The "Comprehensive study of the question of nuclear weapon free zones in all its aspects," which reported to the

[40] John Borrie, "Changing the discourse on nuclear weapons: what it means for campaigners," ICAN Campaigners Kit, International Campaign to Abolish Nuclear Weapons, February 2012.

[41] The secretariat of the Treaty of Tlatelolco, OPANAL, reflects this in its name, which is the Organization for the Prohibition of Nuclear Weapons in Latin America and the Caribbean.

[42] "Nuclear Weapon Free Zones and a ban on nuclear weapons," Article 36, 2014.

[43] Paul D. Beamont and Thomas Rubinsky, "An introduction to the issue of nuclear weapons in Latin America and the Caribbean," International Law and Policy Institute, Background Paper No 2, December 2012.

United Nations General Assembly in 1975, noted that obligations of nuclear weapon free zones may be assumed not only by large regions but also by small groups of States or individual countries.[44]

82. The 1975 study is also notable for its consideration of a number of the questions that will likely be important in the development of a new treaty banning nuclear weapons. One of these is the participation of the nuclear-armed States in the negotiation of zone treaties. The study noted that some experts believed States outside of the zones, especially those with nuclear weapons or those expected to undertake commitments under the treaty, must participate in the negotiation of the zone treaty. Others argued that while arrangements could be made for their participation, this should not be seen as their right.

83. The study also considered the relationship of new prohibition agreements with existing agreements such as the NPT: "Most experts emphasized that the concept of nuclear-weapon-free zones is not to be seen as an alternative to the Non-Proliferation Treaty, but rather as a potentially powerful instrument to supplement that Treaty. Other experts, however, stated that membership in a nuclear-weapon-free zone is an independent measure and indeed a more effective alternative to adherence to the NPT, since the renunciation of nuclear weapons in a zone would go beyond the scope of the NPT, which – among other things – does not contemplate total absence of nuclear weapons."[45]

84. These same arguments have strong resonance with the proposal advocated in this paper for non-nuclear-armed States to initiate work on a new treaty that will establish a framework for the prohibition and elimination of nuclear weapons. If a group of regional likeminded States can develop a treaty to prohibit nuclear weapons, so can a wider group of likeminded States. "Dissatisfaction amongst the non-nuclear powers has led disarmament advocates to increasingly look for alternative legal mechanisms to pro- mote to nuclear disarmament," notes a recent paper from the International Law and Policy Institute. "They would be wise to take inspiration from the Treaty of Tlatelolco."[46] An international treaty banning nuclear weapons could enable nuclear weapon free zone States formally to bring together their collective regional commitments and allow States in regions not covered by a nuclear weapon free zone to join a growing global community of States rejecting nuclear weapons.

The transformative nature of a ban treaty process

85. **Mobilization of civil society**. An international process to develop a treaty banning nuclear weapons could transform civil society engagement in this area. Whilst some may view the negotiation of a treaty prohibiting nuclear weapons as beyond reach under current circumstances, the perception of what is possible can change rapidly.

86. A key component to the perception that a goal is achievable can often be the level and effectiveness of civil society engagement with an issue. The same will undoubtedly be true for a process to ban nuclear weapons.

87. With a focus on a clear goal that does not rely on States with nuclear weapons, a ban treaty process could provide renewed coherence and unity of effort amongst civil society. It may be that the key ingredient necessary to activate the next level of civil society mobilization on nuclear weapons is for political leaders to be asked the question: do you want nuclear weapons to be legal or illegal? Once this question has been established on the multilateral landscape it will become much easier for campaigners to put pressure on

[44] "Comprehensive study of the question of nuclear weapon free zones in all its aspects", Special report of the Conference of the Committee on Disarmament, A/10027/Add.1#, 8 October 1975.

[45] Ibid.

[46] Beamont and Rubinsky, *op. cit.*

decision-makers. It will also make it easier to bring the message to a wider group of organizations and individuals who may not currently see any tangible, believable outcome for advocacy work on nuclear weapons. The initiation of a process to develop a treaty banning nuclear weapons will pose that political question and, in so doing, will provide an unprecedented opportunity for public and institutional engagement.

88. **Pressure and opportunities for politicians**. Once underway, a ban treaty process would provide a very different backdrop for national discussions on nuclear weapons. Even if such a process were to be dismissed as irrelevant by the nuclear-armed States, it would nevertheless provide a strong entry point for critiquing the wisdom and legitimacy of investing large sums of money in weapons that large parts of the world consider immoral, unacceptable, and have deemed to be illegal. Likewise, it will make it difficult for the leaders and politicians of nuclear-dependent States to ignore their citizens' demands for removal of nuclear weapons from their security doctrines or territories.

89. As well as placing pressure on political leaders within nuclear-armed and nuclear-dependent States, a ban treaty process could provide significant opportunities for political leaders in States committed to the elimination of nuclear weapons. In these States, an international instrument prohibiting nuclear weapons can be seen as a major contribution to global peace and security. It would be one of the most significant measures to reshape the post-cold war world and to move our society beyond the worst horrors of the last century. For governments, political leaders, and political parties whose objectives include addressing weaknesses in the international system, a ban treaty could represent a highly attractive and relevant proposition.

90. Banning nuclear weapons would provide a major boost for civil society, diplomats, and political leaders. The achievement of a treaty on nuclear weapons, widely seen as one of the most intractable questions on the international agenda, would show that these actors have the capacity to confront and make progress on the most difficult problems facing humanity. This should provide hope and inspiration for action on the biggest challenges facing us, including climate change, global inequality, and discrimination, oppression, and injustice.

The potential impact of a ban treaty

91. The development of an international agreement prohibiting nuclear weapons could have a variety of effects on the policy and practice of States, depending on the provisions of the treaty and the way it is implemented. Past experience in the development of new international norms strongly suggests a ban treaty would affect the behaviour even of States not joining the treaty. It could do so in several ways, including by putting in place a new international legal standard by which all States will be judged; requiring changes to military doctrines; facilitating divestment from nuclear weapons production; bringing about national legislation on nuclear weapons, including individual criminal responsibility; and establishing a forum in which a community of States meets regularly to discuss implementation and universalization of the treaty.

92. While a treaty prohibiting nuclear weapons without the nuclear-armed States would not constitute disarmament in and of itself, it would directly challenge the acceptability of nuclear weapons for any state under any circumstances and thereby provide further impetus for concrete legal, political, and normative measures to eliminate nuclear weapons.

A new international legal standard

93. A clear legal standard rejecting nuclear weapons would be an important addition to the body of international law on weapons. The existence of a ban treaty would offer States

opposed to nuclear weapons an opportunity to formalize a categorical rejection of the use or possession of nuclear weapons by anyone under any circumstances.

94. A nuclear weapon ban treaty would be complementary to existing legal instruments. It would encourage compliance with and full realization of the disarmament goals identified in the NPT, as well as the United Nations Charter and the Comprehensive Nuclear-Test-Ban Treaty. By prohibiting the one remaining class of weapons of mass destruction, it would also complement the Biological and Toxin Weapons Conventions and the Chemical Weapons Convention.

95. Chemical and biological weapons are already clearly stigmatized, such that not even a pariah state would endorse their development, possession, and use. The recent use of chemical weapons in Syria led to swift condemnation by States and international organizations and has resulted in Syria joining the Chemical Weapons Convention and committing to eliminating its chemical weapons arsenal with international assistance.

96. Establishing a clear rejection of nuclear weapons would enhance the stigma that already exists against these weapons. For individuals and for States, stigma shapes how certain weapons are recognized as unacceptable and incompatible with the identities they wish to hold in the world.[47] The process of banning nuclear weapons would require governments to decide whether they want to continue to support nuclear weapons or reject them entirely. The existence of an international treaty that poses this question would make a significant difference in international and national debates. States opposed to the ban will have to justify their position to domestic and regional and international audiences.

97. In order to justify their continued reliance on these weapons in their security doctrines, nuclear-armed States often rely on an assertion that the use or possession of these weapons is not prohibited for them. In itself, this is a problematic and highly contested reading of the NPT exhibited through statements and declarations by political leaders.[48] A ban treaty would make it clear that this is only because they have refused to join the international legal framework on this issue, not because they have a special legal status. Considering the horriffic consequences that nuclear weapons are designed to cause, such a treaty will increase the political cost for those keeping such weapons and reduce the political incentives for others to acquire them.[49]

98. Not all nuclear-dependent or nuclear-armed States will necessarily be susceptible to public pressure or even pressure from other governments. Some States might pay little heed to international legal or normative agreements when their conception of "vital national interests" are at stake, including perceptions of "strategic parity" with other countries' military capabilities. However, part of the value of treaties is that they can change both conditions and perceptions about a given situation or weapon system that make it possible for such governments to revise their understandings, orientations and practices.

99. Furthermore, resistance by the nuclear-armed States would not necessarily undermine a standard developed by their peers. In fact, establishing such a standard is likely to influence their behaviour. Some of the provisions of 1977 Additional Protocol I to the Geneva Conventions were considered not only innovative, but controversial at the time;

[47] See for example Nina Tannenwald, "The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use" in *International Organization* 53.3, Summer 1999, pp. 433–468 and Richard Price, "A Genealogy of the Chemical Weapons Taboo" in *International Organization* 49.1, Winter 1995, pp. 73–103.

[48] For example, Tony Blair, then-UK prime minister speaking in the House of Commons in 2007, argued that the NPT "makes it absolutely clear that Britain has the right to possess nuclear weapons." See Hansard, House of Commons, Column 260, 1 February 2007.

[49] "Banning nuclear weapons without the nuclear-armed states," Article 36, October 2013.

they were strongly resisted by the United States and, initially, some of its allies. During the course of negotiations, however, the majority of Western States endorsed these provisions. Many governments and experts at the time believed that resistance by the United States Government or other military powers would undermine the protocol's ability to generate global norms. Yet Additional Protocol I has 173 States parties, including China, France, Russia, and the United Kingdom. It has become a frame of reference for policymakers and military leaders regarding contemporary international humanitarian law obligations.[50]

100. Non-adherence to a treaty can also take different forms. States can actively reject the norm established by international law, speaking against it in international forums and asserting that it is illegitimate and irrelevant. They can act broadly in conformity with the norm without explicitly acknowledging it. This is the case for States such as the United States in relation to the prohibition of anti-personnel landmines.[51] Or they can more or less accept the norm without formally adhering to the treaty. In the case of Additional Protocol I, for example, some non-parties have adjusted their conduct in conflicts and their related policies specifically to accord with its provisions.

101. Over time, States' non-adherence to a legal regime can evolve through these different forms so that initial strong rejection of a norm can soften to policy and practice that is consistent with the norm. In the case of a treaty banning nuclear weapons, the fact that there is widespread agreement today on the goal of a world without nuclear weapons will make it difficult for States to speak explicitly against the purpose and ambition of the instrument. At the same time, broad acceptance of other treaties prohibiting weapons of mass destruction will make it difficult to argue that prohibiting unacceptable weapons is not a reasonable way of working towards that goal.

Encouraging changes to military doctrines

102. Accession to a treaty by some States can generate the need to coordinate policy amongst allies, which in turn can raise the political costs of acts that breach the treaty and facilitate behaviour that is in compliance with the treaty's provisions.[52] In the case of a nuclear weapons ban treaty, such policy coordination would need to take place within military alliances such as the North Atlantic Treaty Organization (NATO), bilateral nuclear weapon hosting arrangements, and "extended deterrence" relationships.

103. The North Atlantic Treaty does not mention nuclear weapons. NATO's Strategic Concept, which is a non-binding policy document, describes US nuclear weapons as "the supreme guarantee of the security of the Allies" and French and United Kingdom nuclear weapons as contributing to their "overall deterrence and security." It describes an "appropriate mix of nuclear and conventional capabilities" as a core element of its strategy and emphasizes that "as long as nuclear weapons exist, NATO will remain a nuclear alliance."[53]

104. The International Law and Policy Institute (ILPI), in its analysis of the implications of a ban treaty for NATO States, noted that the Strategic Concept "comprises a set of non-binding political commitments, which may be altered or even disregarded without legal

[50] Adam Bower, Memo on Additional Protocols I and II to the 1949 Geneva Conventions, prepared for Article 36, 20 January 2014.

[51] The United States has not joined the Mine Ban Treaty, but it has not used, produced, or transferred anti-personnel landmines since the treaty was signed in 1997.

[52] Adam Bower, *op. cit.*

[53] Strategic Concept for the Defence and Security of the Members of the North Atlantic Treaty Organization, adopted by Heads of States and Government at the NATO Summit in Lisbon, 19–20 November 2010.

repercussions."[54] ILPI also notes that when it comes to nuclear weapons, some NATO member States have reserved the right to restrict their participation in the Alliance's nuclear weapons activities.

105. Joining a treaty banning nuclear weapons does not mean that NATO members would have to leave the Alliance. However, as ILPI notes, such a treaty would have policy implications for NATO and its member States, for example with regard to nuclear weapons hosting and planning. The arrangements under which US nuclear weapons are located on military bases in Belgium, Germany, Italy, the Netherlands, and Turkey are established in bilateral agreements that are independent of NATO. While this supports the argument that NATO membership itself is not an obstacle to joining a treaty banning nuclear weapons, it should be recognized that these bilateral agreements might need to be revisited in order for those five States to be able to adhere to a nuclear weapons ban treaty.

106. States parties to a nuclear weapons ban treaty that participate in military alliances with non-state parties, especially nuclear-armed States, might for example be required not to assist with acts prohibited under the ban treaty. In this regard, States parties that belong to nuclear alliances would need to renounce their participation in any doctrine or policy involving the stockpiling, deployment, use, or threat of use of nuclear weapons. Similarly, relationships of extended nuclear deterrence, in which a nuclear-armed state pledges to use nuclear weapons to "protect" an ally, might need to be renounced by States parties to the ban treaty.

107. The NATO Strategic Concept provides space for NATO members to pursue measures to prohibit and eliminate nuclear weapons. It notes that changes to the security environment in the 21st century have facilitated the reduction of nuclear weapons stationed in Europe and the Alliance's reliance on nuclear weapons in its strategy. It also commits the Alliance to creating the conditions for further reductions. Banning nuclear weapons could be considered a meaningful initiative in pursuit of this objective. If pursued by NATO members it would likely affect the storage and deployment of US nuclear weapons in Europe and challenge the rationale for modernizing those weapon systems.

108. ILPI argues that despite necessary changes in policy and practice, however, participation in a treaty banning nuclear weapons "would not in itself necessarily prevent military cooperation with States not parties, even if they engage in activities prohibited under the treaty." Different States having different treaty obligations in the fields of disarmament, arms control, human rights, or other law, does not necessarily result in obstacles to interoperability or cooperation in military affairs.[55]

109. The authors of the 1975 'UN comprehensive study of the question of nuclear weapon free zones in all its aspects' considered the question of what implications the new prohibition agreements would have for States within military alliances. According to the report, several experts argued that a non- nuclear-armed state that is in an alliance with a nuclear-armed state can also be a party to a nuclear weapon free zone (NWFZ) treaty. These experts argued that such alliances should not be regarded as being in all cases competitive with NWFZs. However, they emphasized that the terms of membership in the security or military alliance and the NWFZ must be compatible. A state's membership in an alliance cannot justify any exceptions to the obligations arising from the NWFZ treaty.[56]

[54] Stein-Ivar Lothe Eide, ibid, p.4.

[55] Ibid.

[56] "Comprehensive study of the question of nuclear weapon free zones in all its aspects," Special report of the Conference of the Committee on Disarmament, A/10027/Add.1#, 8 October 1975.

Facilitating divestment from nuclear weapons production

110. As noted above, changes to military doctrine in allied States could undermine the incentives and rationale for investing in upgrades of specific nuclear weapon systems. As a whole, the ban treaty could have a significant impact on nuclear weapon modernization programmes and financial investments in nuclear weapons, delivery systems, and related infrastructure.

111. Divestment focuses on financial institutions such as banks, asset managers, insurance companies, and pension funds that invest in nuclear weapons-producing companies. The divestment campaign accompanying the treaty banning cluster munitions has been successful in affecting the financial interests of corporations producing these weapon systems and related components. Some governments have already begun divesting from nuclear weapons producers. Over time this will undermine the benefits these companies currently derive from manufacturing these products. As more pension funds, banks, and public investments are removed from nuclear weapons producers, the political effects will increase.[57]

112. Companies get and stay involved in the nuclear weapons business because it brings them significant income with low financial risk or investment. The work and relationships with governments involved in nuclear weapons facilitate other pro table activities, e.g. in the development and marketing of nuclear power stations, in physical security, or in surveillance, intelligence, and counter-proliferation. A treaty that prohibits investment in corporations materially involved in the production of nuclear weapons or that prohibits material assistance or investment in the development, production, or testing of nuclear weapon systems would go a long way to undermining these companies' rationale for being involved with the nuclear weapons business. For nuclear warheads per se, only a fairly small number of companies are involved, but many of these companies greatly value their wider international business.[58]

113. A recent report by PAX (formerly IKV Pax Christi) detailed the financial investments of 382 financial institutions in 27 countries involved in the production of nuclear weapons. Many of the financial institutions listed in the report are based outside nuclear-armed States including in Australia, Austria, Bahrain, Canada, Denmark, Germany, Indonesia, Ireland, Japan, Jordan, Kuwait, The Netherlands, Norway, Saudi Arabia, Singapore, Spain, South Africa, Sweden, Switzerland, and the United Arab Emirates.[59]

National legislation on nuclear weapons

114. In order to implement their obligations under the ban treaty, all States parties would be encouraged – and some would likely be legally required – to introduce national legislation. These national laws would increase the stigmatisation of nuclear weapons by building a dynamic body of law and practice rejecting these weapons around the world. Such legislation could include laws and policies for divestment from nuclear weapons-producing companies. It could also involve the criminalization of internationally prohibited acts associated with nuclear weapons. National legislation could provide for prosecution of individuals or companies violating the treaty, as well as for protection of those who report such violations. Legislation could reaffirm the rights of victims of nuclear weapons detonations and contain provisions for victim assistance and environmental rehabilitation.

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[57] Greg Mello and Ray Acheson, "The e ects of a treaty banning nuclear weapons on US policy," Los Alamos Study Group, 2014, *forthcoming*.

[58] Ibid.

[59] Don't *Bank on the Bomb: A Global Report on the Financing of Nuclear Weapons Producers*, PAX and ICAN, November 2015.

115. A number of States have already introduced national legislation to prohibit nuclear weapons. The following section is based on The World Future Council's useful 2012 analysis of domestic legislative measures.[60] Existing measures include:

(a) the 1987 New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act;

(b) the 1987 Nuclear Weapons-Free Provision in the Philippine Constitution;

(c) the 1999 Constitutional Law in favour of a Nuclear-Free Austria;

(d) the 2000 Law of Mongolia on its Nuclear- Weapon-Free Status; and

(e) the 2004 Ethical Guidelines for the Norwegian Government Pension Fund.

116. The New Zealand legislation contains a comprehensive set of prohibitions on nuclear weapons including manufacture, acquisition, and possession as well as assistance with these acts. It also prohibits emplacement or transport of nuclear weapons within New Zealand. New Zealand's Prime Minister David Lange articulated the potential normative impact of the legislation his government passed in 1987: "Our nuclear free status is a statement of our belief that we and our fellow human beings can build the institutions which will one day allow us all to renounce the weapons of mass destruction. We are a small country and what we can do is limited. But in this as in every other great issue, we have to start somewhere."[61]

117. The legislation has endured despite the US reacting by suspending its military alliance with New Zealand. In recent years, the US has reversed this decision, restoring full military ties with New Zealand in a move that suggests such national legislation need not be a barrier to broader military cooperation with nuclear-armed States. Mongolia's 2000 legislation establishes the country as a single state nuclear weapon free zone, setting out a comprehensive set of prohibitions on nuclear weapons. Austria's 1999 constitutional law prohibits the testing, production, storage, and transport of nuclear weapons.

118. The Philippine constitutional amendment from 1987 adopts a policy of "freedom from nuclear weapons in its territory."[62] According to The World Future Council, this amendment means that "the government may not store or allow anyone to store nuclear weapons inside the national territory, and nuclear-armed aircraft and vessels may not be allowed to enter."[63]

119. The Norwegian Government Pension Fund adopted ethical guidelines in 2004, which, as recommended by the Graver Committee, exclude from investment companies that "develop and produce key components to nuclear weapons". This is particularly significant because nuclear weapons are treated by the Fund as "weapons that violate fundamental humanitarian principles" in the same way as other weapons prohibited under international law, including landmines and cluster munitions.[64]

120. Efforts are underway in Bangladesh to introduce national legislation on nuclear weapons, establishing the country as a nuclear weapon free zone. The proposed law

[60] Rob van Riet, "Legislative Measures to Further Nuclear Abolition", World Future Council, 2012.

[61] David Lange, acceptance speech for the Right Livelihood Award, 8 December 2003.

[62] Philippine Constitution (1987), Article 2, section 8.

[63] Rob van Riet, *op. cit.*

[64] "Guidelines for the observation and exclusion of companies from the Government Pension Fund Global's investment universe", adopted by the Norwegian Ministry of Finance on 1 March 2010 pursuant to Act no. 123 of 21 December 2005 relating to the Government Pension Fund, section 7.

contains a comprehensive set of prohibitions on nuclear weapons, including on investment in the manufacture of nuclear weapons.[65]

121. The development of domestic legislative measures along the lines of those described above would build on the existing set of prohibitions on nuclear weapons established at the national level and at the regional level through nuclear weapon free zones. At the same time, the development of an international treaty to prohibit nuclear weapons would bring together these existing national and regional provisions in a comprehensive legally-binding standard, by which all States will be judged, whether they join it or not.

Establishing a forum for dedicated discussions for prohibiting and eliminating nuclear weapons

122. The ban treaty would likely require States to meet on a regular basis, providing a forum for States parties and observers to review progress on implementing and promoting the provisions and norms that the ban treaty establishes. This is important for building a community of States, international organizations, civil society groups, and academics to continue working for the complete elimination of nuclear weapons. This has proven very useful in the context of meetings of States parties of other disarmament treaties.

123. The number of States supporting the ban treaty and participating in these meetings will likely grow after it opens for signature. For many States, the legal clarity and moral authority of such a treaty will make it difficult to resist once a political process forces governments to take a clear position either way. Such meetings will also create ongoing pressure on the nuclear-armed States to explain why they will not accept the illegal nature of weapons of mass destruction that threaten the gravest humanitarian consequences.[66]

Conclusion

124. At the end of the Cold War, most publics, politicians, and experts assumed that the nuclear arms race was over and that dismantlement of the two enormous nuclear arsenals would ensue. Instead, the indefinite possession of nuclear weapons, and their continued maintenance and modernisation to that end, became entrenched and normalised. In the meantime, the risk of the use of nuclear weapons, by design or accident, has not diminished either. Nor have the consequences of a detonation.

125. One detonation will cause tens of thousands of casualties and inflict immediate and irreversible damage to infrastructure, industry, livelihoods, and human lives. The use of even a small fraction of the nuclear weapons that exist today would have catastrophic effects upon the global climate, devastating human health, the environment, and our economies for decades to come. These impacts will wreak havoc with food production and displace entire populations.

126. It is thus with great urgency that many governments, international organizations, parliamentarians, and civil society have renewed their demands for nuclear disarmament and have begun to seek new paths to achieve this goal. Many of these actors have begun to call for the development and adoption of a treaty banning nuclear weapons as the most practical, feasible, and effective means forward in the current context.

127. Unlike the other weapons of mass destruction—chemical and biological weapons—nuclear weapons are not yet subject to an explicit legal prohibition. Now is the time to

[65] Rob van Riet, *op. cit.*

[66] "Banning nuclear weapons without the nuclear-armed states," Article 36, October 2013.

address this anomaly, which has been allowed to persist for far too long. History shows that legal prohibitions of weapon systems – their possession as well as their use – facilitate their elimination. Weapons that have been outlawed increasingly become seen as illegitimate. They lose their political status and, along with it, the money and resources for their production, modernization, proliferation, and perpetuation.

128. Without being overly prescriptive, this paper has explored possible elements of a treaty banning nuclear weapons. It situated the concept of such a treaty in relation to other approaches to nuclear weapons that could be considered. The paper also considered issues related to the process of negotiating a treaty and determined the feasibility of a ban treaty, even if negotiated without the nuclear-armed States. Finally, this paper considered the potential normative and practical impacts of a ban treaty on States inside and outside of the treaty.

129. Ridding the world of nuclear weapons will take courage. It will take leadership by States free of nuclear weapons. But as this paper has demonstrated, in is achievable, feasible, and practical. It can be crafted in such a way to establish a comprehensive set of prohibitions and provide a framework under which the elimination of nuclear weapons can be pursued. And it is necessary. At a time when the nuclear-armed States continue to demonstrate their lack of commitment to pursuing tangible, good faith nuclear disarmament, as international tensions rise and nuclear weapons lurk in the background behind the use of military force, and as the potential for accidents persists, banning nuclear weapons is an urgent necessity.

130. A window of opportunity to ban nuclear weapons has opened. Signs of this include the unprecedented level of engagement of the Red Cross and Red Crescent Movement, a renewed enthusiasm within civil society evidenced by the International Campaign to Abolish Nuclear Weapons (ICAN), and an increasing willingness amongst non-nuclear-armed States to consider alternatives to the status quo of international discussions. This is coupled with growing recognition of the full range of catastrophic consequences that would result from any use of nuclear weapons, and of the spectrum of ways in which this could occur—whether intentionally or unintentionally. States, international organizations, and civil society should seize this historic moment and negotiate a comprehensive ban on nuclear weapons now